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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH OLSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The Federal Tort Claims Act (FTCA) expressly limits the United States' waiver of its sovereign immunity, as well as the scope of its substantive liability, to "circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1) (emphasis added); see 28 U.S.C. 2674. Disregarding the plain statutory text, the court of appeals failed to consider the liability of private persons, but instead looked only to whether "*state and municipal entities* would be liable under like circumstances," Pet. App. 5a-7a (emphasis added). And the court held that the United States could be found liable solely on the basis of violations of federal statutory or regulatory provisions that direct the conduct of federal mine inspectors, and that have no application to private persons. As explained in the opening brief, that approach cannot be reconciled with the text of the

FTCA, the decisions of this Court, or the purposes of the FTCA. And it significantly expands the FTCA's waiver of sovereign immunity beyond the bounds established by Congress by effectively creating a private right of action directly under federal regulatory statutes in which Congress declined to create a private right of action.

Respondents expressly acknowledge that subjecting the United States to greater liability than that of a private person would be inconsistent with the FTCA. See Resp. Br. 3, 16. Yet that is precisely what the Ninth Circuit has done in this case. Although Arizona has subjected its own governmental entities to tort liability with respect to mandatory state inspection obligations, private persons are liable to third parties in Arizona for negligent inspections only if the requirements of the "Good Samaritan" doctrine are satisfied. Because the FTCA requires reference to the liability of a private person rather than a governmental entity, the United States may be held liable in this case only if the requirements of the Good Samaritan doctrine are met.

A. THE NINTH CIRCUIT'S REFERENCE TO THE LIABILITY OF STATE GOVERNMENTAL ENTITIES, WITHOUT REGARD TO THE LIABILITY OF A PRIVATE PERSON UNDER LIKE CIRCUMSTANCES, IS FUNDAMENTALLY INCONSISTENT WITH THE FTCA

The court of appeals concluded that "there is no private-sector analogue for mine inspections because private parties 'do not wield [regulatory] power' * * * to conduct such 'unique governmental functions.'" Pet. App. 5a-6a (citations omitted; alteration by court of appeals). It reasoned that "[t]he question thus becomes whether, under Arizona law, state and municipal entities would be liable under like circumstances." *Id.* at 6a. Concluding that "[t]he answer is yes," the court of appeals held that the United States could be

liable under the FTCA, without regard to whether a private person would be liable. Respondents' attempt to defend that decision does not withstand scrutiny.

1. As an initial matter, respondents devote a considerable portion of their brief to refuting a position that the United States does not advance: "that sovereign immunity still protects the United States from liability when its employees conduct activities that private persons do not perform." Resp. Br. 2 (citing U.S. Br. 23); see *id.* at 6-10. As our opening brief explains (U.S. Br. 15), the FTCA's reference to the liability of a private person does not mean that the FTCA applies only to conduct that private persons in fact perform. See *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64-65 (1955). Rather, as the text of the statute instructs, see 28 U.S.C. 1346(b)(1), 2674, the FTCA requires reference to the liability principles of private persons in "like," not "the same," circumstances. See *Indian Towing*, 350 U.S. at 64. In the circumstances of this case, the United States concedes (U.S. Br. 32) that there are private persons in "like circumstances"—private persons who conduct safety inspections. The United States seeks nothing more here than a straightforward application of the plain text of the FTCA.[1]

2. Respondents argue that the Ninth Circuit's approach is necessary to fill a "gap" in the FTCA with respect to conduct that private persons do not regularly perform. Resp. Br. 3, 10. Thus, respondents contend (*e.g.*, *id.* at 10-11) that "when the most analogous circumstances involve conduct generally performed by state actors, the proper analysis

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[1] The point of the discussion on page 23 of our opening brief, cited by respondents (Resp. Br. 2), is that in a case, unlike this one, in which there is no private person in like circumstances, the consequence dictated by the text of the FTCA is that the United States is not liable, see *Feres* v. *United States*, 340 U.S. 135, 141 (1950), not that the court should launch into a search for a non-private entity that might face liability in like circumstances.

under the FTCA is to look to state law that applies to that *state actor*." *Id.* at 15 (emphasis added).

Such an approach flies directly in the face of the plain text of the FTCA. The FTCA does not make the United States liable to the same extent as the "most analogous" actor under state law. See Resp. Br. 15. Rather, it limits the United States' potential tort liability to that of a "*private individual* under like circumstances." 28 U.S.C. 2674 (emphasis added); see 28 U.S.C. 1346(b)(1). Given this clear textual limitation, the Court has long recognized that private-person liability is the touchstone for assessing the United States' potential FTCA liability. See *Indian Towing*, 350 U.S. at 64-65; *Rayonier Inc.* v. *United States*, 352 U.S. 315, 318-319 (1957); *United States* v. *Muniz*, 374 U.S. 150, 164 (1963); *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2747 (2004). In so doing, the Court expressly has rejected reference to State or municipal liability, even in the face of more closely analogous state actors. See, *e.g.*, *Rayonier*, 352 U.S. at 318-319 (rejecting reference to public firefighters in case involving federal firefighters).

Therefore, contrary to respondents' argument (Resp. Br. 10), the "private person" in "like circumstances" test in the FTCA does not give rise to a "gap" that courts are free to fill with some other standard. Here, there is no "gap" because private parties' liability in like circumstances is governed by the Good Samaritan doctrine. Moreover, to the extent that there are "gaps" in Congress's waiver of the United States' sovereign immunity, the courts are not free to fill the gap by extending the waiver beyond the bounds established by Congress. *Smith* v. *United States*, 507 U.S. 197, 203 (1993).

3. Respondents appear to recognize the flaw in the court of appeals' approach, expressly acknowledging that looking to the liability of a state actor would be inconsistent with the FTCA if it "subject[ed] the United States to greater liability

than that of a private person." Resp. Br. 3; see *id.* at 16. Respondents argue, however, that the court of appeals' decision does not have that effect, contending that, under Arizona law, "government actors are treated like private persons for tort liability purposes." *Id.* at 4 (citing *Ryan* v. *State*, 656 P.2d 597, 5.) (Ariz. 1982)). But the Ninth Circuit did not base its decision on any such notion. Quite to the contrary, it concluded that private persons in Arizona could *not* be liable for the type of inspection activity at issue here "because private persons do not wield regulatory power." Pet. App. 5a-6a (brackets and internal quotation marks omitted). That is why the court of appeals looked to the liability of state governmental entities. *Ibid.* And it relied solely on an Arizona case holding that "a state governmental entity, including a state mine inspector, may be held liable under Arizona law for the failure to perform mandatory safety inspections." *Id.* at 6a (citing *Diaz* v. *Magma Copper Co.*, 950 P.2d 1165 (Ariz. Ct. App. 1997)).

Like the court of appeals, respondents rely, as they concede, only upon cases in which the "defendants * * * were governmental entities." Resp. Br. 18. Respondents point to no case in which an Arizona court has held a private person liable for a negligent inspection without first analyzing whether the private person owed the injured third party a duty under private tort law, specifically, the Good Samaritan doctrine. See *id.* at 17-19. That is unsurprising, inasmuch as the statutes upon which Arizona courts have relied to find that state and local governmental entities owe third parties a duty to conduct inspections with reasonable care impose a duty only upon state and local governmental actors, not private persons. See, *e.g.*, *De La Cruz* v. *State*, 961 P.2d 1070, 1072 (Ariz. Ct. App. 1998) (holding that Arizona's occupational safety and health statute imposed an actionable duty on the State to conduct worksite inspections with reasonable care);

Daggett v. *County of Maricopa*, 770 P.2d 384, 386-389 (Ariz. Ct. App. 1989) (holding that state and county regulations requiring a County's Health Department to inspect swimming pools imposed an actionable duty upon the County to inspect facilities with reasonable care).[2] Contrary to respondents' suggestion (see Resp. Br. 15-17, 19), *Ryan* v. *State* does not support application of those cases to safety inspections performed by private persons. *Ryan* rejected the public duty doctrine, thereby generally rendering the State liable for failure to perform, or negligence in the performance of, statutory duties, even where the State would previously have enjoyed a defense that the duty was owed to the public at large, rather than to the specific individual injured. 656 P.2d at 599. *Ryan* did not hold that the substantive duties—and resulting liabilities—of state entities and actors are themselves necessarily the same as those of private persons. State regulatory statutes, such as those requiring specified entities to conduct inspections of private goods or premises, almost invariably apply only to government agencies.

4. In any event, this case does not present the "gap" in the FTCA posited by respondents, as there is a private-person analog within the meaning of the statute. As noted above, the measure of the United States' potential liability is not "a private individual 'under the *same* circumstances,'" it is a private individual engaging in activities of the same "character." *Indian Towing Co.*, 350 U.S. at 64-67 (emphasis

[2] Tellingly, the court in *Daggett* rejected the plaintiff's alternative contention that the County was liable under Section 324A of the Restatement (Second) of Torts (1965), which embodies the Good Samaritan doctrine (see pp. 18-19, *infra*) and governs the liability of private inspectors in Arizona (see p. 7, *infra*). See 770 P.2d at 389-390 (holding that the requirements for liability under Section 324A had not been satisfied). *Daggett* thus underscores that under Arizona law, the liability for governmental inspectors is broader than that of private inspectors.

added). Thus, in *Indian Towing*, the Court held that the question under the FTCA was not whether a private individual would be liable in tort specifically for operating lighthouses (which private persons were not then authorized to do, *id.* at 66-67), but whether a private individual "who undertakes to warn the public of danger and thereby induces reliance" would be liable if he failed to "perform his 'good Samaritan' task in a careful manner." *Id.* at 64-65.

Similarly here, there is a private-person analog to the inspections by the Mine Safety and Health Administration (MSHA): inspections conducted by a private person of property owned by another person. Under Arizona law, a private person may be liable for negligent performance of an inspection that causes injury to a third person, but only if the requirements of the Good Samaritan doctrine set forth in Sections 323 and 324A of the Restatement (Second) of Torts (1965) establish a duty of the private inspector to the injured third party. See *Easter* v. *Percy*, 810 P.2d 1053, 1056-1057 (Ariz. Ct. App. 1991) (claim against consulting engineers for negligent inspection and supervision of construction project); *Papastathis* v. *Beall*, 723 P.2d 97, 100 (Ariz. Ct. App. 1986) (claim that private company negligently inspected and selected defective beverage rack).[3]

[3] Respondents contend, without any supporting citations (Resp. Br. 29), that the proper comparison to a private person "under like circumstances" in the context of this case would be a private person who is *required* to conduct inspections. The United States, however, is not required by Arizona law to conduct inspections, and, by virtue of the Supremacy Clause, it could not be required by state law to do so. See, *e.g.*, *Hancock* v. *Train*, 426 U.S. 167, 178-179 (1976); *Mayo* v. *United States*, 319 U.S. 441, 445 (1920). Insofar as Arizona law is concerned, the United States has voluntarily adopted an inspection program, and any "duties" that program imposes on federal inspectors are owed not to private parties (mine operators or miners), but to the Secretary of Labor, in order to assist the Secretary in ensuring compliance with federal law. The Good Samaritan doctrine therefore is the proper framework for analyzing

The difference between the Good Samaritan doctrine and the Ninth Circuit's approach is crucial. For state and local governmental inspectors, Arizona's statutory and regulatory provisions requiring inspections or requiring due care in the conduct of inspections, standing alone, have been held to create an actionable duty, enforceable in tort, owed by the state or local governmental entity to third persons whose safety may be advanced by the inspections. See *De La Cruz*, 961 P.2d at 1072-1073.[4] In contrast to the statutorily prescribed duties owed to third parties by state and local regulatory agencies under Arizona law, private persons owe a tort duty to third persons under Arizona law only if the requirements of the Good Samaritan doctrine are met. See *Papastathis*, 723 P.2d at 100; Restatement (Second) of Torts, *supra*, §§ 323, 324A; see also pp. 18-20, *infra*. The Ninth Circuit's approach thus subjects the United States to liability in situations where a private person would not be liable, which—as respondents acknowledge (Resp. Br. 3, 16)—is impermissible under the FTCA.

B. FTCA LIABILITY CANNOT BE FOUNDED SOLELY ON THE PROVISIONS OF THE FEDERAL MINE ACT AND FEDERAL REGULATIONS AND POLICIES

Respondents suggest that the FTCA makes the United States liable whenever "the United States negligently performs its statutory and regulatory duties." Resp. Br. 19. None of respondents' rationales for that sweeping proposition withstands scrutiny. *Id.* at 19-28.

1. Under the plain terms of the FTCA, the United States can be liable only if a private person would be held liable for similar conduct under the relevant *state* law. See U.S. Br. 27-28 (discussing *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994)). Respondents do not address *FDIC* v. *Meyer*, but instead once again answer an argument that the United States is not making. See Resp. Br. 19-23. The United States does *not* contend that any conduct by federal employees taken pursuant to their statutory and regulatory obligations is beyond the purview of the FTCA. See *id.* at 19 ("The United States attempts to immunize itself from liability in the performance of its statutes and regulations."). Our point is that federal laws or regulations that purportedly place obligations only on federal employees cannot in and of themselves create FTCA liability in the absence of state law imposing liability on similarly-situated private persons.

As the opening brief makes clear (U.S. Br. 26-30), courts repeatedly have recognized this fundamental limitation on the United States' FTCA liability. See, *e.g.*, *Johnson* v. *Sawyer*, 47 F.3d 716, 728 (5th Cir. 1995) (en banc) (holding that "the violation of a federal statute or regulation does not give rise to FTCA liability unless the relationship between the offending federal employee or agency and the injured party is such that the former, if a private person or entity, would owe a duty under state law to the latter in a *nonfederal* context"); *Ayala* v. *United States*, 49 F.3d 607, 610 (10th Cir. 1995) (holding, with respect to federal mine inspectors, that "[e]ven if specific behavior is statutorily required of a federal employee, the government is not liable under the FTCA unless state law recognizes a comparable liability for private persons").

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the potential liability of the United States in this case, although as explained at pp. 18-20, *infra*, that doctrine furnishes no basis for imposing state tort liability on the United States here. Whether state statutory, contract, or common law imposes any requirements on private parties to conduct inspections in certain circumstances (see Resp. Br. 29) therefore is irrelevant.

[4] In that respect, Arizona law is wholly different from the Federal Mine Safety and Health Act (Mine Act or Act), 30 U.S.C. 801 *et seq.*, which creates no such duty owed to individual miners, much less a cause of action for damages for violation of any such duties. See pp. 14-15, 17-18, *infra*.

Respondents attempt to distinguish the many decisions declining to base FTCA liability solely upon obligations of federal employees under federal law, suggesting that those decisions turned upon the absence of evidence that the state in question would conclude that the relevant federal law imposed an actionable duty upon private persons. See Resp. Br. 24-25 (citing *Delta Sav. Bank* v. *United States*, 265 F.3d 1017, 1026 (9th Cir. 2001)). But the same is true here. As explained below (see Point B.3, *infra*), there is no basis for believing that Arizona would (or indeed could) impose an actionable duty of care upon private persons to perform the *United States'* regulatory responsibilities under the federal Mine Act. In fact, *Delta Savings* supports this point. *Delta Sav.*, 265 F.3d at 1026 ("To bring suit under the FTCA based on negligence per se, a duty must be identified, and this duty cannot spring from a federal law. The duty must arise from state statutory or decisional law, and must impose on the defendants a duty to refrain from committing the sort of wrong alleged here.").

2. Respondents also contend (Resp. Br. 21-23) that the "due care" and "discretionary function" exceptions to FTCA liability demonstrate that the United States is liable whenever its employees negligently perform mandatory statutory and regulatory duties. See 28 U.S.C. 2680(a) (providing a defense to "[a]ny claim based upon an act or omission of an employee * * * exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid," or "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty"). That fundamentally misconceives the nature of the FTCA exceptions. Section 2680(a) does not impose liability. To the contrary, it further limits the FTCA's waiver of sovereign immunity by precluding liability on the part of the United States in certain circumstances *even if* a private

person would be liable. To read the exceptions as creating liability by negative inference, as respondents do (Resp. Br. 21, 23), would impermissibly expand the FTCA's waiver of sovereign immunity well beyond the bounds established by Congress. *Smith*, 507 U.S. at 203.

None of the cases cited by respondents (Resp. Br. 22, 23) supports the view that federal obligations can alone create a basis for FTCA liability. See 28 U.S.C. 1346(b)(1), 2674. For example, *United States* v. *Muniz*, 374 U.S. 150 (1963), reiterated the principle of *Indian Towing*—that the United States' FTCA liability must be judged by reference to the liability of a private person in like circumstances. *Muniz*, 374 U.S. at 164. The statement from *Muniz* upon which respondents rely (Resp. Br. 22) suggests only that, *if* a private person in like circumstances would owe an actionable tort duty under state law, the substance of federal law may be the best source in some circumstances for determining whether the federal employee was in fact negligent—*i.e.*, whether the federal employee breached the standard of care. See 374 U.S. at 164-165 (stating that relevant "duty of care" for claim of negligence against federal prison officers is fixed by a federal statute).[5] The other cases cited by respondents (Resp. Br. 22, 23) simply involve straightforward applications of the FTCA's "due care" and "discretionary function" exceptions; none of the cases suggests that liability can be based on conduct that would not subject a private person to liability under state law,

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[5] See, *e.g.*, *Lutz* v. *United States*, 685 F.2d 1178, 1184 (9th Cir. 1982) ("The federal statute or regulation under which the employee acted only becomes pertinent when a state law duty is found to exist. The federal statute or regulation may then provide the standard for reasonable care in exercising the state law duty."); cf. *Rhoden* v. *United States*, 55 F.3d 428, 430-431 (9th Cir. 1995) (federal law is relevant to the question of whether detention by an INS officer was legally privileged, where state law defines false imprisonment as nonconsensual confinement without lawful privilege).

whether because of the absence of any actionable duty or for other reasons.[6]

3. Respondents next contend that the United States can be held liable in this case under Arizona's "negligence per se" doctrine. See Resp. Br. 24-28. Respondents are incorrect.

a. Respondents' argument proceeds at such a high level of generality and abstraction that, if accepted, it would render virtually meaningless the FTCA's limitations on the United States' waiver of its sovereign immunity. Respondents appear to argue (*e.g.*, Resp. Br. 25) that, because Arizona law sometimes applies a theory of negligence per se to private persons and may look to federal statutes and regulations to create both a duty and a standard of care on the part of private persons in some situations, the United States ipso facto can be liable under a negligence per se theory for failure to follow *any* federal statute or regulation, even when the

[6] See *Hatahley* v. *United States*, 351 U.S. 173, 180-181 (1956) (recognizing that federal employees' destruction of plaintiffs' horses would state a willful tort claim against private persons under state law, and rejecting government's "due care" and "discretionary function" defenses); *Dupree* v. *United States*, 247 F.2d 819, 824-825 (3d Cir. 1957) (recognizing that FTCA claim must be grounded in state law, but rejecting claim because government employee's conduct was protected by "due care" exception); *Donohue* v. *United States*, 437 F. Supp. 836, 840-841 (E.D. Mich. 1977) (recognizing that allegations of injury to plaintiff's business reputation and earning ability stated valid claim under state law, and concluding that disputed facts existed regarding government's asserted "due care" and "discretionary function" defenses); see also *United States* v. *Gaubert*, 499 U.S. 315, 322-334 (1991) (interpreting discretionary function exception); *Berkovitz* v. *United States*, 486 U.S. 531, 535 & n.2 (1988) (same); *Phillips* v. *United States*, 956 F.2d 1071, 1074-1077, 1078 (11th Cir. 1992) (same). And *Hines* v. *United States* cannot aid respondents, as the Ninth Circuit in that case made the same legal error challenged here. See 60 F.3d 1442, 1448-1449 (9th Cir. 1995) (imposing duty upon the United States for alleged failure to follow mandatory postal regulations because California would subject its own public entities to similar liability). Indeed, the decision below relied on *Hines*. Pet. App. 5a-6a.

federal statute or regulation applies only to federal agencies and employees and imposes *no* duty or standard of care on a private person. But the FTCA provides no warrant for conjuring from general negligence per se principles under state law a novel tort duty that would apply only to the United States and not to a private person. That would read the "private individual under like circumstances" limitation out of the FTCA. If that argument were valid, it would follow that, as long as state law applies a general negligence theory of liability to private persons, the United States could be held liable for *any* negligence by its employees in the performance of their jobs, regardless of the circumstances.[7] The appropriate level of generality is neither negligence law in the abstract, nor the obligations placed only on federal mine inspectors by federal law, but the duties imposed on private persons under the Good Samaritan doctrine. Cf. *Indian Towing*, 350 U.S. at 64-65, 69.

The circuit court cases cited by respondents (Resp. Br. 24) do not support respondents' sweeping negligence per se theory. For example, like the cases relied upon by the United States (U.S. Br. 26-30), *Cecile Industries, Inc.* v. *United States*, 793 F.2d 97 (3d Cir. 1986), held that a State's negligence per se doctrine did *not* provide a basis for liability under the FTCA where the conduct at issue would not give rise to a claim against a private person under state law. *Id.* at 100. In *In re Sabin Oral Polio Vaccine Products Liability*

[7] Respondents' reliance (Resp. Br. 14-15) on a supposed concession by the United States misconstrues the point in our opening brief. In referring to "broader principles of state law that encompass actions by private individuals as well" as potentially providing special privileges or prerogatives to law enforcement officers, see U.S. Br. 24-25 n.7, the United States was referring to principles of state law that would apply to private individuals *under like circumstances*, not principles that merely apply to private individuals in the abstract or in dissimilar circumstances.

Litigation, the district court engaged in the type of analysis that the Ninth Circuit should have—it looked to state-law Good Samaritan principles applicable to private persons in determining whether the United States owed a duty to the plaintiffs. See 774 F. Supp. 952, 954 (D. Md. 1991) ("[T]he [federal] regulations, standing by themselves, do not give rise to any legal duty under the FTCA."); see also *id.* at 953 n.3. The court then looked to the federal regulations only to determine whether the duty of care it identified had been breached—*i.e.*, to determine the standard of care. *Id.* at 955-957. In the appellate decision in that case, cited by respondents, the Fourth Circuit similarly looked to federal regulations solely to establish the applicable standard of care, not to impose a duty in the first place. See *In re Sabin Oral Polio Vaccine Prods. Liability Litig.*, 984 F.2d 124, 127-128 (4th Cir. 1993) (per curiam); see also note 5, *supra*.

In *Moody* v. *United States*, 774 F.2d 150 (1985), the Sixth Circuit did state that "since under Tennessee law a private individual could be held liable for violation of a federal regulation, the United States under the FTCA is exposed to similar liability." *Id.* at 157. Whatever the Sixth Circuit intended by that general statement, it proceeded to hold that the United States could not be liable based on the federal regulations at issue, which it concluded "inherently limit[ed] the scope" of the United States' duties and in particular imposed no duties running to the plaintiffs. *Id.* at 157-158. In any event, the Sixth Circuit later rejected application of a negligence per se theory to establish liability under the FTCA in the precise context presented here: alleged violation by MSHA inspectors of the obligations imposed on them by the Mine Act and implementing regulations. *Myers* v. *United States*, 17 F.3d 890, 899 (6th Cir. 1994). The *Myers* court pointed out that the regulations directing the actions of federal mine inspectors merely establish a means of monitoring compliance by mine operators, and any "duties" they impose on inspectors "run only to the Secretary of Labor, not to the miners." *Id.* at 900 (citing *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1144-1145 (1st Cir. 1977) (same as to FAA inspectors), cert. denied, 435 U.S. 1006 (1978)); see *Town of Castle Rock* v. *Gonzales*, 125 S. Ct. 2796, 2808 (2005) ("Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people."). The court further observed in *Myers* that it is improper to use the negligence per se doctrine as a means of "making the government liable as an insurer for every private party's violation of a federal regulatory scheme," where Congress has refused to create an express cause of action for the government's failure to perform a particular regulatory function under that scheme. 17 F.3d at 901. To do so, the court reasoned, "would, in effect, be permitting a private cause of action under the Act." *Ibid.*

Similarly, to the extent that *Gill* v. *United States*, 429 F.2d 1072, 1075 (5th Cir. 1970), may be read to locate a state-law duty in a federal statute directed only to a federal agency, it was clearly superseded by the Fifth Circuit's en banc decision in *Johnson*. There, the Fifth Circuit held that "the FTCA requires that the duty breached by the government employees be not simply one imposed by federal statute or regulation, but rather arise under state law." *Johnson*, 47 F.3d at 737; see *id.* at 728 (describing *Gill* as a case in which the Fifth Circuit analyzed the United States' duty under the "local law good Samaritan rule").

b. Accordingly, it is not enough, as respondents suggest (Resp. Br. 26-28), simply to ask whether the federal Mine Act was enacted at least in part to promote the safety of miners and whether the federal mine inspectors violated certain provisions of the statute or relevant regulations directing their conduct. In order to determine whether the United

States could be held liable for such a violation, the FTCA demands an inquiry into the liability of private persons in like circumstances, and the Good Samaritan doctrine provides the answer to that inquiry.

Respondents cite (Resp. Br. 25, 28) *Martin* v. *Schroeder*, 105 P.3d 577 (Ariz. Ct. App. 2005), for the proposition that under Arizona's negligence per se doctrine, state law may look to federal law to provide both a source of a duty and a standard of care, and argue that the federal Mine Act should be given the same effect here. Respondents' reliance on *Martin* is misplaced. The provision of the federal gun control statute that barred the delivery of a firearm to an unlawful user of or person addicted to a controlled substance, 18 U.S.C. 922(d)(3), at issue in *Martin*, directly proscribed conduct by private persons. See 105 P.3d at 582-584. As such, the state court concluded that the gun control statute could provide a basis for a negligence per se claim against parents who allegedly provided a gun to their son, a marijuana user, because the plaintiff claimed that their conduct directly contravened the terms of a statute that applied to them. *Id.* at 582-584.

Whatever other objections there may be to holding the United States liable through the FTCA for violations of federal statutes by federal employees based on a state decision like *Martin*, this case differs from *Martin* in a fundamental respect. In contrast to *Martin*, this is not a case in which the relevant provisions of federal law impose duties on private persons, which could then, by extension, be made the source of state tort duties applicable to the federal government under the FTCA. The provisions of the federal Mine Act relied upon by respondents require only federal employees, not private persons, to perform inspections. See 30 U.S.C. 813. As such, no private person could violate those provisions of the Mine Act. Accordingly, by virtue of the

"private individual under like circumstances" test in the FTCA, the Mine Act cannot—either directly or via *Martin*—be the source of a duty and resulting liability of the United States under the FTCA.[8]

4. Basing an FTCA claim solely on obligations purportedly required of federal employees under the Mine Act would be inconsistent not only with the plain language of the FTCA, but also with the Mine Act. The Mine Act expressly states that primary responsibility for the safety of miners remains with the mine operators and the miners. See 30 U.S.C. 801(e) (providing that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe] conditions and practices in such mines"). As the Sixth Circuit has explained, any duty imposed upon federal inspectors under the Mine Act "run[s] only to the Secretary of Labor, not to the miners." *Myers*, 17 F.3d at 900. Nevertheless, and despite the Mine Act's express disclaimer, the Ninth Circuit adopted an approach that essentially would render the United States directly responsible for the safety of particular individual miners, without regard to whether a private person would owe a duty in similar circumstances under state law.

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[8] Moreover, a negligence per se action would not lie against a private person even as a matter of state law in these circumstances, because, under Arizona law, if the tort defendant has not violated the relevant statute, the statute cannot be the basis of a negligence per se claim. See *Thompson* v. *Sun City Community Hospital, Inc.*, 688 P.2d 647, 656 (Ariz. Ct. App. 1983) (holding that negligence per se doctrine was inapplicable because the federal statute did not apply to the defendant), rev'd on other grounds, 688 P.2d 605 (Ariz. 1984); *Bloxham* v. *Glock Inc.*, 53 P.3d 196, 202 (Ariz. Ct. App. 2002) (rejecting application of negligence per se because plaintiffs did not allege that the defendants had violated the law); *Bell* v. *Smitty's Super Valu, Inc.*, 900 P.2d 15, 16-17 (Ariz. Ct. App. 1995) (rejecting negligence per se claim because defendant's conduct did not violate the terms of the relevant statute).

Such a result cannot be squared with the Mine Act any more than it can be with the FTCA.

In short, there is no basis for assessing the United States' tort liability in the present case under any standard other than the Good Samaritan doctrine.

C. IF THE COURT REACHES THE ISSUE, THE REQUIREMENTS OF THE GOOD SAMARITAN DOCTRINE WERE NOT SATISFIED IN THE PRESENT CASE

Because the Ninth Circuit applied Arizona law applicable to governmental entities rather than the law applicable to private persons, it did not evaluate whether the United States would be liable under Arizona's Good Samaritan doctrine. It therefore would be appropriate to remand to the court of appeals to address that question in the first instance. Respondents contend that if the Court does address that question, it should find that the United States would be liable under the Good Samaritan doctrine as incorporated in Arizona law. Resp. Br. 31-33. To the contrary, in that event, the Court should affirm the district court's conclusion that respondents "have failed to state a viable negligent inspection claim under the Restatement." Pet. App. 23a-24a.

In this Court, respondents rely solely on Section 324A(c) of the Restatement (Second) of Torts (1965) for their contention that the United States owed a Good Samaritan duty to the miners. Under that subsection:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if * * *

> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Id. § 324A(c). See *Papastathis*, 723 P.2d at 100; *Easter*, 810 P.2d at 1056 (quoting Restatement). Respondents base their contention on barebones declarations from Mr. Olson and Mr. Vargas attesting that each relied upon MSHA "to inspect the ASARCO Mine with the goal of making the mine a safe place for me and other miners to work" and assumed "that the inspectors had expertise and would use it to exercise reasonable safety practices." J.A. 98-99.

Given that the Mine Act expressly states that "the operators of * * * mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe] conditions and practices in such mines," 30 U.S.C. 801(e)—and that federal inspections are enforcement measures designed to ensure compliance by mine operators and miners—the United States cannot be said to have "undertake[n] * * * to render services" to either the mine operator or the miners, a necessary predicate to Good Samaritan liability. See Restatement, *supra*, §§ 323, 324A. Moreover, "[i]n light of the clear Congressional purpose to ensure that the primary responsibility for safety remains with the mine owners and miners, 30 U.S.C. § 801(e), [any] reliance —even had it occurred—would have been manifestly unreasonable and unjustified." *Myers*, 17 F.3d at 904; accord *Raymer* v. *United States*, 660 F.2d 1136, 1143 (6th Cir. 1981).[9]

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[9] For these reasons, respondents' citation (Resp. Br. 32-33) to an illustration in the Restatement concerning an elevator inspection misses the mark. See Restatement, *supra*, § 324A cmt. e, illus. 4. In that illustration, the building owner employed the inspector to perform inspection services for the owner. Here, by contrast, the inspections at issue are part of the regulatory and enforcement responsibilities of the government, not services rendered to the mine operator. Moreover, in light of the primary responsibility of the mine

In any event, respondents' declarations are wholly inadequate to establish the requisite element of reliance under the Restatement and Arizona law. Neither respondent claims or even suggests that he relied on any specific conduct by inspectors related to the supposedly unsafe conditions or practices in the area where their injuries occurred. Neither claims that he was unaware of the hazards that resulted in his injuries. Furthermore, neither claims that he failed to take necessary precautions or avail himself of other remedies because of MSHA's inspection activities. But as the Restatement explains, the accident could not truly be said to have resulted from MSHA's conduct—and the respondents' reliance thereon—unless the miners were "induced * * * to forgo other remedies or precautions." Restatement, *supra*, § 324A cmt. e; accord *Myers*, 17 F.3d at 903; *Tollenaar* v. *Chino Valley Sch. Dist.*, 945 P.2d 1310, 1312 (Ariz. Ct. App. 1997) (relying upon lack of evidence that plaintiffs "forewent other precautions in reliance" upon defendant's actions); see also *Dorking Genetics* v. *United States*, 76 F.3d 1261, 1268 (2d Cir. 1996) (holding that conclusory assertions of reliance were insufficient where plaintiff did not show "that it took, or declined to take, any action in reliance on the United States' performance of its duty").

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The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

AUGUST 2005

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operator, Asarco Mining Company, for ensuring the safety of its miners, any reliance by Asarco (or the miners) on MSHA's inspection activities to ensure the safety of the mine would have been unreasonable. See pp. 14-15, 19, *supra*.